Filed 7/2/19 P. v. Ault CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP JOSEPH AULT, Defendant and Appellant.	C086668 (Super. Ct. No. 17F4084)

Defendant Phillip Joseph Ault appeals a judgment entered after a jury found him guilty of felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and misdemeanor concealing evidence (§ 135), and the trial court found true the allegation that he had suffered a prior prison term. (§ 667.5, subd. (b).) Defendant challenges the sufficiency of the evidence supporting his assault and concealment convictions. We shall affirm.

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[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

The following is a description of the People's evidence supporting his conviction.

G. Shuck testified to unloading stepping stones he had purchased for use in his community garden when defendant approached him, stopping about five feet away. Defendant did not respond to Shuck's greeting or his inquiry concerning defendant's well-being. Shuck finished loading the stones into a "hand wagon" and took them to the community garden. He noticed defendant was initially following about 10 to 20 feet behind him, but later dropped further behind.

Shuck was down on the ground on one knee, and in the process of unloading the stones from his wagon, when he turned and noticed defendant "was coming down toward [his] head with a pipe." Defendant swung at him from behind, so Shuck could not otherwise describe defendant's swinging motion. Nonetheless, Shuck believed if he had not moved, the pipe would have hit his head because "[i]t was coming directly down toward [his] head."

Shuck deflected the pipe with his arm and received a "small abrasion" and a bruise on his forearm, for which he declined medical treatment.[2] Shuck later clarified that the pipe did not make "head on" contact with his arm. Shuck thought the pipe was "metal tubing, not a heavy, galvanized pipe," which was approximately one-half to five-eighths of an inch thick and consistent with piping he had seen used as stakes in the garden.

Shuck told defendant, " 'Now you're in a whole bunch of trouble' " and called out for someone to call 911. Defendant responded, " 'They set me up. They told me you were going to blow something up.' " Defendant started to back away. Shuck, worried defendant would get away, followed him keeping a distance of about six to eight feet. When they encountered a gathering of people, Shuck was joined in his pursuit by S.

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[2] Nonetheless, the serious nature of the attack is underscored by Shuck's testimony that he now keeps watch for attacks when gardening.

Chapman. Defendant picked up the pace and briefly disappeared. At some point, Shuck saw defendant with the pipe wrapped up in his shirt. When defendant reappeared, the pipe was gone. Defendant made his way towards the complex office, and the police arrived.

Chapman testified to calling the police with her cell phone in response to Shuck's calls for help. Shuck was "out of breath and frantic." After calling authorities, she joined Shuck in following defendant. They told defendant they had called the Redding Police Department. Defendant had the pipe wrapped in a shirt and was knocking on apartment doors. She lost sight of defendant for five to 10 seconds, and when he reemerged he no longer had the pipe. They continued to follow him until authorities arrived. After authorities arrived, Chapman led an officer to the last place she had seen defendant with the pipe, and they "backtracked until [they] found the pipe on the ground." It was laying "in the walkway/common area" for the apartments and not obscured by anything.

Corporal Will Williams testified to responding to the scene where he was contacted by Chapman, who led him to the area where defendant was. Corporal Williams ordered defendant to put his hands up. Defendant made rapid, unsolicited statements that did not make sense to Williams. Nonetheless, defendant followed Williams' commands and was taken into custody. Williams noticed defendant's body was rigid, he was sweating profusely, and his pulse was rapid. Corporal Williams believed defendant's symptoms were consistent with methamphetamine use. Williams tried to get defendant's name and date of birth, but did not otherwise question him given his condition.

The pipe was admitted into evidence and was described by Williams as being "almost the weight of kind of a heavy curtain rod."[3] Williams opined that, given the weight of the pipe, which he estimated to be about one pound, if defendant's swing had

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[3] While not described in the testimony presented to the jury, we know from the hearing on the motions in limine that the pipe was two feet long.

connected with the victim's head, the pipe would have caused serious injury. Specifically, Williams opined it was capable of inflicting "severe lacerations," including cutting through flesh, causing "a tremendous amount of bleeding, permanent scarring, [and] disfigurement." Williams also believed that "if a person were struck with [the pipe], it could easily cause them to have a concussion, [and] could even fracture the skull, even though it appears so light." Corporal Williams' observation of Shuck's injury was consistent with the photograph he was shown in court, and he believed it would have taken time for swelling and bruising to fully develop.

Defendant's section 1118.1 motion for acquittal on insufficiency of evidence was denied, and defendant rested without presenting a defense case. Thereafter, the jury found defendant guilty of both the assault and concealment. In a bifurcated trial, the court found true that defendant had suffered a prison prior. The trial court sentenced defendant to the upper term of four years for the assault, one year for the prison prior, and a concurrent 180-day term for the misdemeanor concealment count for a total aggregate term of five years. Defendant timely appealed.

II. DISCUSSION

Defendant contends his convictions for assault and concealment of evidence were not supported by sufficient evidence. For the assault, he asserts there was insufficient evidence showing the pipe was *actually used* in a manner likely to produce great bodily injury. For the concealment, he argues his abandonment of the pipe in a public area after announcement of the calling of the police is insufficient to sustain his conviction. We disagree.

In determining a sufficiency of the evidence challenge, we "review the whole record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The focus of the

substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In other words, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) The standard is the same in cases in which the People rely primarily on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.) " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" (*Id.* at p. 933.)

A. Sufficient Evidence Supports the Pipe Was Used As a Deadly Weapon

Defendant argues the People presented insufficient evidence to establish that the pipe was actually used in a manner capable and likely to produce death or great bodily injury. Defendant downplays the pipes characteristics, focusing instead on the lack of specifics concerning defendant's swing and the minimal resulting injury to argue there was insufficient evidence that defendant actually used the pipe in a deadly manner. We disagree.

As our high court explained in *People v. Aguilar* (1997) 16 Cal.4th 1023: "Section 245, subdivision (a)(1), punishes assaults committed by the following means: 'with a deadly weapon or instrument other than a firearm,' or by 'any means of force likely to produce great bodily injury.' One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial. [Citation.] . . . [¶] As

used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*Id.* at pp. 1028-1029; see also *In re B.M*. (2018) 6 Cal.5th 528, 532-535 [reaffirming *Aguilar* and its requirement that the object in question be actually used in a manner *likely to produce* death or great bodily injury].)

We find *People v. Brown* (2012) 210 Cal.App.4th 1 (*Brown*) instructive. In *Brown*, the defendant challenged his conviction for assault with a deadly weapon arising from his shooting of two men with a BB gun. (*Id.* at p. 7.) Relying on *Aguilar*'s guidance that the deadly nature of the weapon could be shown by any relevant facts, *Brown* rejected defendant's argument that the lack of evidence in the record concerning the type of BB gun, operating speed, and whether the gun used could shoot pellets that would penetrate the body, combined with the minor nature of the victims' injuries mandated reversal of his conviction. (*Id*. at pp. 7-8.) Brown concluded that defendant's close proximity to the victims when he fired at them out of the driver's side window resulting in red welts on their feet and back supported his conviction. (*Id*. at p. 8.) "[T]he jury could have reasonably inferred the location and severity of [the victims'] injuries were fortuitous: Had [the victims] not thrown themselves on the ground for cover, they just as easily could have been hit in the face, causing serious injury." (*Ibid*.)

Here, Shuck testified that he was on the ground when defendant swung the pipe *down* towards his head. Shuck managed to deflect the pipe with his arm, resulting in a

glancing injury. Thus, while defendant swung the pipe at Shuck's head, it did not make direct contact with his head, much less his arm. Like the defendant in *Brown*, here, the jury could have reasonably inferred the minor nature of Shuck's injuries were fortuitous. (*Brown*, *supra*, 210 Cal.App.4th at p. 8.)

Uncontroverted evidence established the pipe, which was admitted into evidence and available for examination by the jury, was two feet long and consistent with the weight of a "*heavy* curtain rod." (Italics added.) Corporal Williams testified that if such a weapon was swung towards and connected with the head, it would have caused severe lacerations, concussion, or even death. Thus, there was substantial evidence that the pipe was used in a manner capable and likely to produce great bodily injury of death. (See *Brown*, *supra*, 210 Cal.App.4th at p. 8; *In re B.M.*, *supra*, 6 Cal.5th at p. 535 [it is appropriate to consider the harm that "could have resulted from the way the object was actually used"]; see also *In re Jose R.* (1982) 137 Cal.App.3d 269, 276-277 [expert's unrebutted testimony regarding consequences of swallowing pin hidden in apple sufficient to support conviction even though victim did not actually ingest that pin].)

B. Sufficient Evidence Supports the Concealment of Evidence Conviction

Defendant argues his abandonment of the pipe in a common area after being told of the calling of the police is insufficient to sustain his conviction. We disagree.

Section 135 states: "A person who, knowing that any . . . other matter or thing, is about to be produced in evidence upon a trial, inquiry, or investigation, authorized by law, willfully destroys, erases, or conceals the same, with the intent to prevent it or its content from being produced, is guilty of a misdemeanor."

Here, authorities recovered the pipe, such that defendant was convicted on a theory of concealment. Caselaw interpreting the elements of section 135 is scant. However, we can deduce certain boundaries within which to evaluate the evidence presented in this case.

Concerning the timing element of whether the evidence was "about to be produced in evidence upon . . . investigation," (§ 135) on one end of the spectrum in *People v. Prysock* (1982) 127 Cal.App.3d 972, evidence destroyed following the murder victim's unfulfilled *threat* to call the police and prior to the discovery of that murder, was insufficient to sustain a conviction for section 135. (*Id.* at pp. 981, 998-1001.) There, "the prosecution failed to show that any law enforcement investigation had in fact started and/or that law enforcement was or would be looking for the particular item," (*id.* at p. 1001) which in that case were the defendants' clothes worn the night of the murder (*id*. at p. 998). On the other end of the spectrum, *People v. Fields* (1980) 105 Cal.App.3d 341 recognized that an investigation had, indeed, started when a deputy sheriff discovered drugs during a routine search that defendant then flushed down the toilet. (*Id.* at pp. 345-346.)

Here, Chapman called the police and affirmatively told defendant the police had been contacted while she and Shuck pursued him so that he would not get away pending arrival of the authorities. Thus, the jury could have reasonably inferred that defendant was aware a police investigation was forthcoming. Further, defendant had every reason to believe the police would be looking for the pipe he had used in the assault.

Defendant nonetheless argues that there was insufficient evidence that he actually attempted to conceal the pipe, which had been left in a common area of the apartments or that his actions appreciably impeded the investigation. What defendant ignores is that, unlike the defendant in *People v. Hill* (1997) 58 Cal.App.4th 1078, 1091, , who was found not to have concealed counterfeit checks abandoned in front of investigating officers, here, defendant abandoned the pipe during the short time that he had

successfully escaped from the watchful pursuit of Chapman and Shuck.[4] Thus, the jury could have reasonably inferred that defendant discarded the pipe in order to conceal it from authorities, whose arrival was imminent. That defendant concealed the pipe in a less than optimal location, deducible from witness observations of him, does not alter that substantial evidence supported his conviction. (See *People v. Bean*, *supra*, 46 Cal.3d at p. 933 [that circumstances could be reasonably reconciled with a contrary finding does not warrant reversal of the jury's supported finding].) On these facts, we disagree with defendant that discarding evidence, while aware that a police investigation is forthcoming, is insufficient to sustain a section 135 conviction for concealment. Whatever the minimum threshold may be, we find it was met under the circumstances of this case.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

MURRAY, J.

[4] Defendant's assertion that "a neighbor and the victim both observed what the prosecution argued was the abandonment" is contrary to the record. Neither Chapman nor Shuck affirmatively saw defendant act as he discarded the pipe.